BEFORE THE
**FEDERAL COMMUNICATIONS COMMISSION**
WASHINGTON, D.C. 20554



In the Matter of

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|---|---|---|
| Amendment of Section 73.202(b) | ) | |
| Table of Allotments | ) | MB Docket No. 05-67 |
| FM Broadcast Stations | ) | RM-11116 |
| (Fishers, Lawrence, Indianapolis | ) | RM-11342 |
| and Clinton, Indiana) | ) | |
| | ) | |

**To: The Secretary**
for delivery to Chief, Audio Division, Media Bureau.

**Petition for Reconsideration**

Word Power, Inc. ("Word Power"), the licensee of Noncommercial Educational FM Station WPFR-FM, Clinton, Indiana, by its attorneys and pursuant to 47 C.F.R. Sec. 1.429 of the Commission's Rules, hereby submits this Petition for Reconsideration (the "Petition") of the Report and Order (the "Order"), released June 29, 2007, terminating the above-referenced proceeding(s). This petition is timely filed pursuant to 47 C.F.R. Sec. 1.429(c).

**INTRODUCTION**

Word Power seeks reconsideration of the Order because the Audio Division erred in four respects in its issuance:

(1) The Order does not address – in fact, completely ignores – the extensive comments, submitted by Word Power, demonstrating that Lawrence, Indiana does

not meet the independent community test, *see Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988), otherwise known as a "Tuck Showing."[1]

(2) The Commission did not condition the allotment changes in the Order upon reimbursement to Word Power for expenses arising from the channel change that the Order contemplates for WPFR-FM.

(3) The Commission failed to properly inquire about premature, upgraded operations by one of the stations whose licensees seek the changes the Order improperly authorized.

(4) The Order was not published in the Federal Register, in violation of the Administrative Procedure Act, 5 U.S.C. Sec. 553.

## DISCUSSION

### (1) The Order Completely Ignores Extensive Comments on the Record

The Order is merely conclusory. It states only that proponents in this rulemaking have "provided an acceptable *Tuck* analysis." *Order* at para. 6. Nothing more is provided. Not even a mention appears of Word Power's seven page-long analysis demonstrating that Lawrence, the community then proposed and now approved for first local service, does not qualify as an independent community for purposes of a first local service preference. It lies within an urbanized area (Indianapolis) and is not sufficiently independent to qualify for a first local service preference had the Tuck Showing factors been fully analyzed. *Response to Order to Show Cause*, at 4-11.

In the *Response to Order to Show Cause,* Word Power demonstrated that the majority of the *Tuck* showing factors do not demonstrate Lawrence's independence from

[1] Lawrence was clearly shown to be a dependent part of the Indianapolis Urbanized Area in *Response to Order to Show Cause*, filed by Word Power on April 25, 2005.

the greater urbanized area. *See Parker and Port St. Joe, Florida*, 11 FCC Rcd 1095 (1996).

By ruling on this key substantive issue without analysis of the evidence on the record – especially evidence that wholly contradicts its holding – the Audio Division has violated a cardinal tenet of Administrative law. The Commission has not provided a concise statement of its rulemaking decision based on "consideration of the relevant matter presented." *See* 5 U.S.C. 553(c). Absent evidence that the Commission actually considered what was presented to it, its determination is arbitrary and capricious.

"It is familiar law that an agency treads an arbitrary course when it fails to 'articulate any rational connection between the facts found and the choice made.'" *Action for Children's Television v. FCC,* 852 F2d 1332, 1341 (1988) (citing *Burlington Truck Lines v. U. S.*, 371 U.S. 156, 168 (1962) (other citations omitted).

Here the Commission articulated nothing but a conclusion, that the Lawrence *Tuck* Showing was sufficient. No reasons given – despite the presence of a contrary showing on the record. In so doing, the Commission has ignored its responsibilities under Section 553(c) of the Administrative Procedure Act.

Had the Audio Division actually evaluated the seven pages of hard evidence that Word Power submitted, demonstrating that Lawrence does not qualify as an independent community for Tuck Analysis purposes, it should have arrived at a different conclusion. But because the Audio Division did nothing more than reach a conclusion and present nothing more than that conclusion to explain its determination, it is impossible for Word Power, other opponents, or a reviewing court to determine why the Commission made the

decision that it did. The Administrative Procedure Act does not permit administrative *ipse dixits.* The presence of such prohibited practices in the Order presents a fatal flaw.

**(2) The Order Does Not Require Reimbursement to Stations Forced to Move**

The Commission's policy is clear, reimbursement to Word Power should have been ordered. *Circleville, Ohio*, 8 FCC 2d 159 (1967). Even the proponents of the allotment scheme here acknowledge that they should pay expenses that would be imposed on other licensees forced, unwillingly, to move under terms of the Order.

Oddly, the Audio Division seems to have overlooked this basic fairness requirement – much as it forgot to justify its decision declaring Lawrence independent for allotment purposes despite a significant quantum of evidence to the contrary. Given the absence of conditions in the Order requiring such reimbursement, it is reasonable to assume that the financial burden of implementing the Order will rest on those forced to move their stations, such as Word Power. But insofar as the Commission's policy has been long been clear, the Commission must explain its departure from prior policy – rather than merely impose it without explanation.

Given the apparent change to its own policy and practice by failing to condition the allotment changes in the Order on such reimbursement, and the lack of any explanation for this change in policy and practice, the Order again runs afoul of the Administrative Procedure Act.

Quite simply, the Order should have provided "a reasoned analysis for departing from prior precedent." *Fox Television Stations, Inc. v. FCC*, ____ F. 3d _____ Nos. 06-1760-ag (L), 06-2750-ag (CON), 06-5358-ag (CON), 2007 U.S. App. LEXIS 12868, at *36 (2d Cir. 2007) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut.*

*Auto. Ins. Co.*, 463 US 29, 41-42) ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance") (other citations omitted)).

The Order provides no such explanation and by including a novel departure from reimbursement requirements, it is also fatally flawed – and must be reversed.

**(3) Failure to Inquire Properly About Premature Station Upgrade**

The Commission, in the course of these proceedings, received a letter from Indiana Community Radio Corporation, alleging "apparent high power operation" by WISG (Facility ID No. 71438). *Request for Expedited Processing of Counterproposal*, filed Sep. 26, 2006 by Indiana Community Radio Corporation. The allegations suggested that this station, now operating as WWFT, one of the proponent stations in these proceedings, had prematurely upgraded before the Commission had completed processing of the instant matter.

In response, the Audio Division directed Indy Lico, Inc, one of the proponents, and "licensee of FM Station WWFT, to identify all periods of time during which it operated with Class B1 facilities on Channel 230. "*Letter of John A. Karousos to Mark N. Lipp, Esq.*, Apr. 19, 2007 (the "Karousos Letter").

In response, Indy Lico, LLC stated "that it has never operated WWFT with Class B1 facilities." This statement may be true – but may not reflect the whole truth because in the Karousos Letter, the Audio Division asked only about WWFT and about operation with Class B1 facilities. It did not ask about excessive power operations by this same licensee when operating under this same station's prior call sign, WISG, at other than Class B1 facilities.

Represented by able counsel, Indy Lico, LLC, responded to the Commission's exact question – albeit a faulty question that so narrowed the scope of the inquiry that illegal operation when the station was known as WISG could be safely skirted – and any over-powered operation at other than Class B1 parameters could similarly be skirted in the licensee's response.

The Audio Division's presentation of faulty inquiry questions means the Order was not premised on all the information that should have been collected. As a result, the Order must be set aside, and the Audio Division must re-ask Indy Lico, LLC about any operation of the station, assigned Facility Identification Number 71438, with excessive power, under any call sign during the licensee's tutelage – whether or not such overpowered operation met Class B1 standards or not.

Until this is task is completed and the record filled appropriately, the current Order must be set aside because it was issued in error.

**(4) The Order Was Not Properly Published in the Federal Register**

The Order was issued as the outcome of Rulemaking, as defined by the Administrative Procedure Act ("APA"). 5 U.S.C. Sec. 551(4)-(5). As such, the must be published in the Federal Register as a prerequisite to applicability. Such publication in the Federal Register is not optional. It is clearly required. 5 U.S.C. Sec. 553(d). This statute provides only three exceptions – none of which apply to this matter. *See* APA, Sections 553(d)(1)-(3). Therefore, the Commission may not implement the Order until at least thirty days after publication in the Federal Register. Implementation without publication is an *ultra vires* act and the Commission is expressly barred from such unlawful activity. Proper publication will, therefore delay the 90-day implementation of

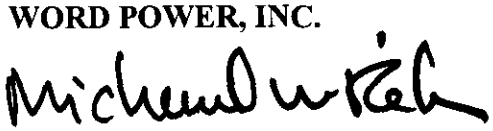
the Orders provisions – and no party may be compelled to apply for channel changes pursuant to the Order until the requisite time has passed after the required publication in the Federal Register.

## CONCLUSION

WHEREFORE, Word Power, respectfully requests that the Commission RECONSIDER the Order, deny the Petition for Rule Making filed by Indy Lico, Inc. and WFMS Lico, Inc. and grant Word Power's Counterproposal, and, by virtue of the lack of required publication, effectively stay any provision in the Order until the Order is published in The Federal Register pursuant to the APA.

Respectfully Submitted,

**WORD POWER, INC.**



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July 30, 2007

**CERTIFICATE OF SERVICE**

I, Carla Whitlock, a secretary at Fletcher, Heald & Hildreth PLC, hereby certify that a true and correct copy of the foregoing "PETITION FOR RECONSIDERATION" was sent this 30th day of July 2007, First-Class United States Mail, postage prepaid to the following (or by email where indicated):

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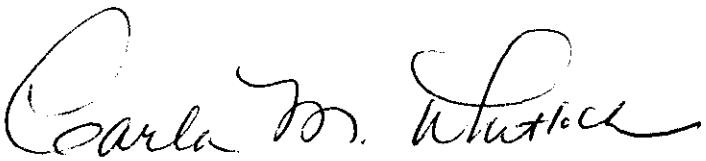

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